Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 28 September 2023 [1]

Case C-336/22

f6 Cigarettenfabrik GmbH & Co. KG
v
Hauptzollamt Bielefeld

(Request for a preliminary ruling from the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany))

(Reference for a preliminary ruling – Taxation – Directive 2008/118/EC – General arrangements for excise duty – Article 1 – Directive 2011/64/EU – Structure and rates of excise duty applied to manufactured tobacco – Article 14 – Tax on tobacco – Heated tobacco – National legislation establishing, for heated tobacco, a tax structure and tax rate differing from those applicable to other smoking tobaccos)

I. Introduction

1. The present reference for a preliminary ruling invites the Court to rule on the compatibility of a supplementary tax on new tobacco products with the provisions of EU law on excise duties.

2. The request for a preliminary ruling concerns, more specifically, the interpretation of Article 1(2) of Directive 2008/118/CE, [2] and of point (b) of the first subparagraph of Article 14(1), point (c) of the first subparagraph of Article 14(2), and Article 14(3) of Directive 2011/64/EU. [3]

3. The request has been submitted in proceedings between f6 Cigarettenfabrik GmbH & Co. KG ('the applicant') and the Hauptzollamt Bielefeld (Principal Customs Office, Bielefeld, Germany ('the defendant'), concerning the defendant's decision to subject the applicant, in addition to the excise duty on smoking tobacco, to a supplementary tax on rolls of heated tobacco which it produces ('the tax at issue').

[1] Original language: French.

[2] Council Directive of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC (OJ 2009 L 9, p. 12).

[3] Council Directive of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco (OJ 2011 L 176, p. 24).

II. Legal context

A. European Union law

1. Directive 2008/118

4. According to recital 4 of Directive 2008/118, 'excise goods may be subject to other indirect taxes for specific purposes. In such cases, however, and in order not to jeopardise the useful effect of Community rules relating to indirect taxes, Member States should comply with certain essential elements of those rules'.

5. Article 1 of that directive states:

'1. This Directive lays down general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of the following goods (hereinafter "excise goods"):

…

(c) manufactured tobacco covered by [Directive 2011/64].

2. Member States may levy other indirect taxes on excise goods for specific purposes, provided that those taxes comply with the Community tax rules applicable for excise duty or value added tax [(VAT)] as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned, but not including the provisions on exemptions.

3. Member States may levy taxes on:

(a) products other than excise goods;

…'

2. Directive 2011/64

6. Recitals 2, 4, 8 and 9 of Directive 2011/64 state:

'(2) The Union's fiscal legislation on tobacco products needs to ensure the proper functioning of the internal market and, at the same time, a high level of health protection …

…

(4) The various types of manufactured tobacco, distinguished by their characteristics and by the way in which they are used, should be defined.

…

(8) In the interests of uniform and fair taxation, a definition of cigarettes, cigars and cigarillos and of other smoking tobacco should be laid down so that, respectively, rolls of tobacco which according to their length can be considered as two cigarettes or more are treated as two cigarettes or more for excise purposes, a type of cigar which is similar in many respects to a cigarette is treated as a cigarette for excise purposes, smoking tobacco which is similar in many respects to fine-cut tobacco intended for the rolling of cigarettes is treated as fine-cut tobacco for excise purposes, and tobacco refuse is clearly defined …

(9) As far as excise duties are concerned, harmonisation of structures must, in particular, result in competition in the different categories of manufactured tobacco belonging to the same group not being distorted by the effects of the charging of the tax …'

7. Article 1 of that directive provides:

'This Directive lays down general principles for the harmonisation of the structure and rates of the excise duty to which the Member States subject manufactured tobacco.'

8. Article 2 of that directive is worded as follows:

'1. For the purposes of this Directive manufactured tobacco shall mean:

(a) cigarettes;

(b) cigars and cigarillos;

(c) smoking tobacco:

(i) fine-cut tobacco for the rolling of cigarettes;

(ii) other smoking tobacco.

2. Products consisting in whole or in part of substances other than tobacco but otherwise conforming to the criteria set out in Article 3 or Article 5(1) shall be treated as cigarettes and smoking tobacco.

…'

9. Article 3(1) of that directive provides:

'For the purposes of this Directive cigarettes shall mean:

(a) rolls of tobacco capable of being smoked as they are and which are not cigars or cigarillos …;

(b) rolls of tobacco which, by simple non-industrial handling, are inserted into cigarette-paper tubes;

…'

10. Article 5(1) of Directive 2011/64 states:

'For the purposes of this Directive smoking tobacco shall mean:

(a) tobacco which has been cut or otherwise split, twisted or pressed into blocks and is capable of being smoked without further industrial processing;

(b) tobacco refuse put up for retail sale which does not fall under Article 3 and Article 4(1) and which can be smoked. …'

11. Article 13 of that directive provides:

'The following groups of manufactured tobacco produced in the Union and imported from third countries shall be subject, in each Member State, to a minimum excise duty as laid down in Article 14:

(a) cigars and cigarillos;

(b) fine-cut tobacco intended for the rolling of cigarettes;

(c) other smoking tobaccos.'

12. Article 14 of that directive provides:

'1. Member States shall apply an excise duty which may be:

(a) either an *ad valorem* duty calculated on the basis of the maximum retail selling price of each product …; or

(b) a specific duty expressed as an amount per kilogram, or in the case of cigars and cigarillos, alternatively for a given number of items; or

(c) a mixture of both, combining an *ad valorem* element and a specific element.

In cases where excise duty is either *ad valorem* or mixed, Member States may establish a minimum amount of excise duty.

2. The overall excise duty (specific duty and/or *ad valorem* duty excluding VAT), expressed as a percentage, as an amount per kilogram or for a given number of items, shall be at least equivalent to the rates or minimum amounts laid down for:

(a) cigars or cigarillos: 5% of the retail selling price inclusive of all taxes or EUR 12 per 1 000 items or per kilogram;

(b) fine-cut smoking tobacco intended for the rolling of cigarettes: 40% of the weighted average retail selling price of fine-cut smoking tobacco intended for the rolling of cigarettes released for consumption, or EUR 40 per kilogram;

(c) other smoking tobaccos: 20% of the retail selling price inclusive of all taxes, or EUR 22 per kilogram.

…

3. The rates or amounts referred to in paragraphs 1 and 2 shall be effective for all products belonging to the group of manufactured tobaccos concerned, without distinction within each group as to quality, presentation, origin of the products, the materials used, the characteristics of the firms involved or any other criterion.

…'

B. German law

13. The Tabaksteuergesetz (Law on tobacco tax) of 15 July 2009 (BGBl. 2009 I, p. 1870), as amended by the Law of 10 August 2021 (BGBl. 2021 I, p. 3411) ('the TabStG'), provides, in paragraph 1:

(1) Manufactured tobaccos, heated tobacco and water pipe tobacco shall be subject to tobacco tax [which] constitutes an excise duty within the meaning of the Abgabenordnung (General Tax Code).

(2) Manufactured tobacco includes:

1. cigars or cigarillos …

2. cigarettes …

3. smoking tobacco (fine-cut tobacco or pipe tobacco): cut or otherwise split tobacco, twisted or pressed into blocks, capable of being smoked without further industrial processing.

(2a) For the purposes of this Law, heated tobacco is smoking tobacco in individual portions, intended for consumption by inhalation of an aerosol or smoke produced in a device.

…'

14. Paragraph 1a of the TabStG, entitled 'Heated tobacco, water pipe tobacco', provides that 'unless otherwise provided, the provisions of this Law relating to smoking tobacco, and the associated implementing measures, shall also apply to heated tobacco and to water pipe tobacco.'

15. Paragraph 2 of that law provides:

'(1) The amount of the tax shall be:

1. for cigarettes

…

(b) for the period from 1 January 2022 to 31 December 2022, 10.88 cents per unit and 19.84% of the retail selling price, but not less than 22.276 cents per unit, after deduction of the turnover tax on the retail selling price of the taxable cigarette;

…

4. for pipe tobacco

…

(b) for the period from 1 January 2022 to 31 December 2022, EUR 15.66 per kilogram and 13.13% of the retail selling price, but not less that EUR 24.00 per kilogram;

5. for heated tobacco, the amount of the tax provided for in point 4, plus a supplementary tax at 80% of the amount of the tax provided for in point 1 less the amount of the tax provided for in point 4. For the purposes of the calculation of the amount provided for in point 1, an individual portion of smoking tobacco shall be equivalent to one cigarette;

…'

III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

16. The applicant produces rolls of heated tobacco, wrapped in a co-laminated paper with an aluminium coating, designed to be inserted in a battery-operated heating device, in which they are heated to a temperature below their combustion temperature. The result is an aerosol containing nicotine, which consumers may inhale through a mouthpiece.

17. Under the national legislation in force until 31 December 2021, the amount of tax payable on heated tobacco was determined on the basis of the calculation applied to pipe tobacco. However, the German legislature provided that, from 1 January 2022, that amount would be increased by a sum which it expressly describes as a supplementary tax ('the supplementary tax'). Under the national legislation in force from that date, the tax payable on heated tobacco consists of an amount determined on the basis of the calculation applicable to pipe tobacco and of that supplementary tax. The supplementary tax corresponds to 80% of the amount obtained by applying to the rolls of tobacco in question the rate of tax laid down for cigarettes, less the amount determined on the basis of the calculation applicable to pipe tobacco.

18. In that context, the applicant brought an action before the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany), the referring court, disputing the legality, in the light of Directive 2008/118, of the supplementary tax imposed, from 1 January 2022, on rolls of heated tobacco.

19. By its action in the main proceedings, the applicant maintains that:

– the levying of the supplementary tax on heated tobacco is contrary to Article 1(2) of Directive 2008/118 because it constitutes an unauthorised excise duty;

– furthermore, the supplementary tax is not levied for specific purposes, since the proceeds of the tax are not used to cover expenditure linked with health protection;

– the levying of such a supplementary tax is contrary to Article 14(3) of Directive 2011/64, since manufactured tobaccos cannot be treated differently within the group of other smoking tobaccos.

20. The defendant contested the action, submitting that:

– the supplementary tax on heated tobacco is a non-harmonised national excise duty, the levying of which is not contrary to Article 1(2) of Directive 2008/118;

– the levying of that supplementary tax pursues the specific purpose of reducing the consumption of nicotine – which is harmful to health – by taxing heated tobacco in a manner similar to cigarettes. The incentive purpose of that supplementary tax is sufficient to constitute a specific purpose within the meaning of Article 1(2) of Directive 2008/118;

– since the supplementary tax at issue in the main proceedings is not a harmonised tax, it is not required, in accordance with Article 1(2) of Directive 2008/118, to meet the requirements of Article 14 of Directive 2011/64.

21. It was in those circumstances that the Finanzgericht Düsseldorf (Finance Court, Düsseldorf) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Must Article 1(2) of [Directive 2008/118] be interpreted as precluding national legislation of a Member State on the levying of tobacco tax on heated tobacco which provides, with regard to the calculation of the tax, that, in addition to the tax rate for pipe tobacco, a supplementary tax which is 80% of the tax amount for cigarettes less the tax amount for pipe tobacco is to be levied?

(2) If the supplementary tax on heated tobacco is not another indirect tax on excise goods for specific purposes within the meaning of Article 1(2) of Directive 2008/118 …: [m]ust Article 14(3) of [Directive 2011/64] be interpreted as precluding national legislation … on the levying of tobacco tax on heated tobacco which provides, with regard to the calculation of the tax, that, in addition to the tax rate for pipe tobacco, a supplementary tax which is 80% of the tax amount for cigarettes less the tax amount for pipe tobacco is to be levied?

(3) If the supplementary tax on heated tobacco is not another indirect tax on excise goods for specific purposes within the meaning of Article 1(2) of Directive 2008/118 …: must point (b) of the first subparagraph of Article 14(1) and point (c) of the first subparagraph of Article 14(2) of Directive [2011/64] be interpreted as precluding national legislation … on the levying of tobacco tax on heated tobacco which provides, with regard to the calculation of the tax, that that tax is to be determined according to the *ad valorem* tax rate and a specific tax rate based on the weight and given number of rolls of tobacco?’

22. Written observations were lodged by the applicant, the German Government and the European Commission. Those parties also submitted oral observations at the hearing on 15 June 2023.

IV. Analysis

A. The first question

23. The first question put by the referring court seeks to determine whether Article 1(2) of Directive 2008/118 allows a Member State to levy on goods such as the rolls of heated tobacco at issue in the main proceedings, apart from the excise duty on pipe tobacco which is always applicable, a supplementary tax of 80% of the amount of the tax on cigarettes less the amount of tax for pipe tobacco.

24. In reality, that question is subdivided into two sub-questions that must be carefully distinguished.

25. It is apparent that, by its question, the referring court seeks to ascertain, in essence, first, whether that supplementary tax must be characterised as an 'excise duty' within the meaning of Article 1(1) of Directive 2008/118, or as an 'other indirect tax' within the meaning of paragraph 2 of that article.

26. If the tax at issue is classified as an 'other indirect tax' within the meaning of Article 1(2) of Directive 2008/118 and therefore comes under that provision, the referring court seeks to ascertain, second, whether that tax meets the requirements laid down by that provision and is therefore permissible under EU law.

27. As a preliminary point, since Article 1(2) of Directive 2008/118 governs the conditions under which Member State may levy other indirect taxes on 'excise goods', it must be ascertained that heated tobacco comes within the scope of that directive.

1. The scope of Directive 2011/64

28. It should be observed, first, that Directive 2011/64 does not expressly refer to products such as those produced by the applicant. More precisely, apart from the fact that that directive does not define the expression 'heated tobacco', that product does not belong to any of the separate categories of tobaccos expressly identified in Article 2(1) of that directive. As is apparent from the various reports relating to Directive 2011/64 issued by the Commission and the Council, a number of 'new' tobacco products, including those at issue in the present case, did not exist when that directive was adopted and appeared on the market after it had entered into force.[4] Furthermore, unlike other areas of EU law, such as the combined nomenclature, which is

[4] See, in that regard, the Evaluation of 10 February 2020 of Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco, SWD(2020) 33 final, p. 15, and the Council Conclusions concerning the structure and rates of excise duty applied to manufactured tobacco, Document No 8483/20 of 2 June 2020.

determinative for the tariff classification in customs law and which has in the meantime been adjusted to take account of the appearance of those new products,[5] Directive 2011/64 has remained unaltered in that respect.[6]

29. Notwithstanding the preceding observations, I am of the view that 'heated tobacco' should be included in the scope of that directive.

30. It follows, in the first place, from the very wording of that directive that, in providing for a residual category of 'other smoking tobaccos', the EU legislature did not intend to restrict the scope of Directive 2011/64 as regards manufactured tobaccos subject to excise duty, but intended that existing tobacco products intended to be smoked, other than those explicitly designated, should also be subject to excise duty.[7]

31. Furthermore, a broad interpretation of the scope of that directive, to include, as 'other smoking tobaccos', all comparable tobacco products which are in competition with the products expressly mentioned, would correspond with objectives of ensuring both the smooth functioning of the internal market[8] and a high level of health protection.[9] It should be noted, in that regard, that the Court has held that the definition of 'smoking tobacco' in Article 2(1) and Article 5 of Directive 2011/64 cannot be construed narrowly, having regard specifically to the objectives of that directive.[10]

32. As regards, in the second place, and more specifically, the definition of the expression 'smoking tobacco', as the Court has held, it is apparent from the wording of Article 5(1)(a) of Directive 2011/64 that that provision requires that two cumulative conditions be met, first, that the tobacco be *cut or otherwise split, twisted or pressed into blocks* and, second, that it be *capable of being smoked without further industrial processing*.[11]

33. It appears to follow both from the description contained in the order for reference and from the parties' answers at the hearing that the tobacco products at issue in the main proceedings are capable of meeting those two conditions.

5 Thus, in the version resulting from Commission Implementing Regulation (EU) 2021/1832 of 12 October 2021 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 2021 L 385, p. 1), the combined nomenclature has since 1 January 2022 drawn a distinction between 'smoking tobacco' and 'products intended for inhalation without combustion'. Heated tobacco, as a product containing tobacco intended for inhalation without classic combustion, now comes within subheading 2404.

6 See also Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ 2014 L 127, p. 1), which also draws a distinction between 'tobacco products for smoking' and 'smokeless tobacco products'.

7 That is also apparent from Article 2(2) of Directive 2011/64, which provides that other products consisting in whole or in part of substances other than tobacco are to be treated as smoking tobacco.

8 Thus, recital 9 of Directive 2011/64 states that harmonisation of structures of excise duties must result in competition in the different categories of manufactured tobacco belonging to the same group not being distorted by the effects of the charging of the tax and, consequently, in the opening of the national markets. The objective of ensuring undistorted competition is also made clear in recital 8 of Directive 2011/64, which states, in essence, that products similar to those coming within a particular category should be treated, for the purposes of excise duties, as coming within that category.

9 See recital 2 of Directive 2011/64 and judgment of 16 September 2020, *Skonis ir kvapas* (C-674/19, EU:C:2020:710, paragraphs 31 and 32).

10 Judgment of 6 April 2017, *Eko-Tabak* (C-638/15, EU:C:2017:277, paragraph 24).

11 Judgments of 6 April 2017, *Eko-Tabak* (C-638/15, EU:C:2017:277, paragraph 25), and of 16 September 2020, *Skonis ir kvapas* (C-674/19, EU:C:2020:710, paragraph 36).

34. As regards the first condition, it is clear from the order for reference that the rolls of tobacco at issue in the main proceedings consist of *compressed tobacco produced from tobacco dust*. As regards the second condition, it follows from that order that, although the tobacco is not burned, but merely heated, that process is comparable with the action of smoking cigarettes or other tobacco products, which is such as to make that product capable of being smoked. [12] The Court has already recognised, in that respect, that even in the absence of combustion, a product that is merely heated may be regarded as smoking tobacco. [13]

35. It must be stated, in the third place, that, having regard to the objectives pursued by Directive 2011/64, set out in point 31 of this Opinion, all comparable tobacco products, having regard to their characteristics, their harmful effects for health and the competitive relationship with other products expressly referred to in that directive, must be included in the concept of 'smoking tobaccos' and, accordingly, in the scope of that directive. On the basis of the findings made by the referring court as concerns its mode of consumption as a substitute for 'conventional' tobacco, heated tobacco appears to be sufficiently comparable with the other tobacco products referred to in Directive 2011/64 to be capable, in consequence, of being regarded as an 'other smoking tobacco' for the purposes of that directive.

36. It follows from the foregoing elements that heated tobacco is a manufactured tobacco within the meaning of Article 1(1)(c) of Directive 2008/118 and therefore comes within the scope of Directive 2011/64 as an 'other smoking tobacco' within the meaning of Article 2(1)(c)(ii) of Directive 2011/64.

2. The classification of the tax at issue as an 'other indirect' tax

37. Having established that the product at issue comes within the scope of Directive 2008/118, I shall now examine whether the tax at issue may be regarded as an 'other indirect tax' within the meaning of Article 1(2) of Directive 2008/118, as the German Government and the Commission maintain, or whether, rather, it is an excise duty, as the applicant suggests.

38. It should be noted, as a preliminary point, that Directive 2011/64 does not govern, in a harmonised and exhaustive manner, the taxation of tobacco products and expressly provides that Member States may levy other indirect taxes on excise goods. [14]

39. However, in accordance with Article 1(2) of Directive 2008/118, those indirect taxes, distinct from excise duty, may be levied on excise goods only on two conditions: first, such taxes must be levied for *specific purposes* and, second, those taxes must comply with the EU rules applicable to excise duty or VAT as far as the determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned. Those two conditions, which are intended to prevent 'other indirect taxes' from improperly obstructing trade, are cumulative, as is apparent from the very wording of Article 1(2) of Directive 2008/118. [15]

[12] The referring court states, in that regard, that when they are heated, the products manufactured by the applicant release an aerosol containing nicotine, which, like traditional tobacco smoke, is inhaled by the consumer through a mouthpiece.

[13] Judgment of 16 September 2020, *Skonis ir kvapas* (C-674/19, EU:C:2020:710, paragraph 45).

[14] See Article 1(2) of Directive 2008/118.

[15] Order of 7 February 2022, *Vapo Atlantic* (C-460/21, EU:C:2022:83, paragraphs 21 and 22).

(a) The existence of a non-budgetary 'specific purpose'

40. It follows from the Court's settled case-law that a specific purpose within the meaning of Article 1(2) of Directive 2008/118 is a purpose other than a purely budgetary purpose.[16] However, since every tax necessarily pursues a budgetary purpose, the mere fact that a tax is intended to achieve a budgetary objective cannot, in itself, suffice – if Article 1(2) of Directive 2008/118 is not to be rendered meaningless – to preclude that tax from being regarded as having, in addition, a specific purpose within the meaning of that provision.[17]

41. Furthermore, while the predetermined allocation of the proceeds of a tax to the financing of the exercise, by the authorities of a Member State, of powers transferred to them can constitute a factor to be taken into account for the purpose of establishing the existence of a specific purpose, such an allocation, which is merely a matter of internal organisation of the budget of a Member State, cannot, in itself, constitute a sufficient condition, since any Member State may decide to lay down, irrespective of the purpose pursued, that the proceeds of a tax are to be allocated to financing particular expenditure. Were that not so, any purpose could be considered to be specific within the meaning of Article 1(2) of Directive 2008/118, which would deprive the harmonised excise duty established by that directive of all practical effect and be contrary to the principle that a derogating provision such as Article 1(2) must be interpreted strictly.[18]

42. In the absence of such a mechanism for the predetermined allocation of revenue, a tax on excise goods can be regarded as pursuing a specific purpose within the meaning of Article 1(2) of Directive 2008/118 only if it is designed, so far as its structure is concerned, and particularly the taxable item or the rate of tax, in such a way as to guide the behaviour of taxpayers in a direction which facilitates the achievement of the stated specific purpose, for example by taxing the goods in question heavily in order to discourage their consumption[19] or by encouraging the use of other goods that are less harmful by reference to the objective pursued.[20]

43. Having thus clarified the Court's case-law, I shall now proceed to analyse the fiscal measure at issue, in order to determine whether it pursues a 'specific purpose'.[21]

44. It should be observed, first of all, that it follows from the order for reference that the national legislation at issue does not establish any mechanism for the predetermined allocation of the revenue from that supplementary tax for purposes linked with health protection.[22]

45. In the absence of such a predetermined allocation, it is therefore necessary, next, to examine whether that tax is planned in such a way as to guide the behaviour of taxpayers in a direction which facilitates the achievement of the stated specific purpose, within the meaning of the case-law cited in point 42 of this Opinion.

16 Order of 7 February 2022, *Vapo Atlantic* (C-460/21, EU:C:2022:83, paragraph 23 and the case-law cited).

17 Judgment of 22 June 2023, *Endesa Generación* (C-833/21, EU:C:2023:516, paragraph 39 and the case-law cited).

18 Judgment of 22 June 2023, *Endesa Generación* (C-833/21, EU:C:2023:516. paragraph 40 and the case-law cited).

19 Judgment of 22 June 2023, *Endesa Generación* (C-833/21, EU:C:2023:516, paragraph 42 and the case-law cited).

20 Judgment of 27 February 2014, *Transportes Jordi Besora* (C-82/12, EU:C:2014:108), and Opinion of Advocate General Wahl in *Transportes Jordi Besora* (C-82/12, EU:C:2013:694, points 17 to 32).

21 See also point 54 of this Opinion.

22 I note, moreover, that that finding is not disputed by the German Government.

46. It should be borne in mind, in that regard, that the objective pursued by the German legislature is health protection and, more specifically, the reduction of the consumption of nicotine, by taxing heated tobacco in a manner comparable with cigarettes.

47. The referring court expresses doubts as to the 'specific aims' pursued by the German law on the ground that the objective of health protection referred to in that law is also pursued by the provisions of Directive 2011/64.[23] The applicant, for its part, also maintains that the fact that the objectives pursued by the legislation at issue in the main proceedings correspond with those pursued by the excise duty thus precludes the possibility that that law might be interpreted as pursuing a 'specific purpose'.

48. To my mind, the issue raised by the referring court calls for the following observations.

49. It should be noted, in the first place, that while Article 1(2) of Directive 2008/118 authorises Member States to levy an 'other indirect tax' on excise goods, the fact nonetheless remains that that provision is in the nature of a derogation and must therefore be interpreted narrowly. The expression 'other indirect taxes' within the meaning of that provision thus refers to indirect taxes which are levied on the consumption of the products listed in Article 1(1) of that directive – other than 'excise duty' within the meaning of that provision – and are levied for specific purposes.[24] If a Member State could also rely on the purposes already pursued by the harmonised tobacco tax as 'specific purposes' within the meaning of Article 1(2) of Directive 2008/118, the harmonised provisions of that directive would be rendered meaningless. Such an interpretation would, moreover, compromise efforts to harmonise the excise duty regime and give rise to an additional excise duty, contrary to the very purpose of that directive to abolish the remaining barriers to the internal market.[25]

50. However, notwithstanding the limited scope which Member States have to pursue specific purposes, to give that derogatory provision the scope suggested by the applicant would amount, in essence, to depriving the Member States of all power of initiative and would thus render that provision wholly pointless. The very existence of that derogation flows from the EU legislature's intention not to bring about the complete harmonisation of the regime for the taxation of the excise goods at issue in order to take account of the different national legislative orders within the European Union.[26] As the Court has held, moreover, Article 1(2) of Directive 2008/118 seeks to take due account of the Member States' different fiscal traditions in that regard and the frequent recourse to indirect taxation for the implementation of non-budgetary policies, which allows Member States to introduce, in addition to the minimum excise duty, other indirect taxes having a specific purpose.[27]

[23] See recital 2 of Directive 2011/64.

[24] Judgment of 3 March 2021, *Promociones Oliva Park* (C-220/19, EU:C:2021:163, paragraph 48 and the case-law cited).

[25] See Opinion of Advocate General Wahl in *Transportes Jordi Besora* (C-82/12, EU:C:2013:694, point 22).

[26] It should be borne in mind, in that regard, that it follows from the drafting history of Council Directive 92/80/EEC of 19 October 1992 on the approximation of taxes on manufactured tobacco other than cigarettes (OJ 1992 L 316, p. 10) that the Commission initially intended that the products covered by that directive would not be subject to any taxation other than excise duty and VAT; however, that approach was rejected by the Council, which wished to maintain the possibility for Member States to employ the tool of indirect taxation. See, to that effect, Proposal for a Council Directive on the general arrangements for products subject to excise duty and on the holding and movement of such products (COM(90) 431 final, p. 3).

[27] Order of 7 February 2022, *Vapo Atlantic* (C-460/21, EU:C:2022:83, paragraph 20).

51. In that context, the 'specific purpose' criterion contributes in my view to delimiting the possibility for Member States to introduce a supplementary tax, by restricting its effects to what is necessary in order to avoid completely undermining the excise duty regime established by Directives 2008/118 and 2011/64.

52. As regards, in the second place, the objective of health protection, it should be noted that while that is among the objectives referred to in recital 2 of Directive 2011/64, that directive was adopted on the basis of Article 113 TFEU and aims mainly to harmonise excise duties (and other forms of indirect taxation) in order to ensure the establishment and the smooth functioning of the internal market and to avoid distortion of competition. It follows from the Court's case-law, moreover, that the fact that health protection is a general objective of Directive 2011/64 cannot automatically preclude a supplementary tax which is also intended to protect health from pursuing a 'specific purpose' within the meaning of Article 1(2) of Directive 2008/118. [28]

53. It follows, in the third place, from the Court's case-law cited in point 42 of this Opinion that a tax measure is capable of ensuring the achievement of a 'specific purpose' when it is capable of discouraging the consumption of certain products because they are taxed more highly.

54. It should be borne in mind, in that regard, that when the Court is requested to give a preliminary ruling in order to determine whether a tax established by a Member State pursues a specific purpose within the meaning of Article 1(2) of Directive 2008/118, its task is to provide the national court with guidance on the criteria which will enable the latter to determine whether that tax actually pursues such a purpose, rather than to carry out that assessment itself, a fortiori since the Court does not necessarily have available to it all the information which is essential in that regard. [29] It is ultimately for the referring court, which is responsible for establishing all the relevant facts, to determine whether the supplementary tax at issue in the main proceedings may be understood as pursuing a 'specific purpose' in the sense described above. [30]

55. That having been made clear, I am of the view, as are the German Government and the Commission, that the tax at issue pursues a 'specific purpose'.

56. It follows from the findings made by the referring court that the supplementary tax at issue in the main proceedings does not merely pursue, in a general manner, the objective of ensuring a high level of health protection but has, above all, the *specific objective* of deterring nicotine-dependent consumers from abandoning cigarettes in favour of rolls of heated tobacco. By adapting the fiscal regime applicable to heated tobacco and 'aligning' it with that of cigarettes, the German legislation at issue pursues a specific incentive (or deterrent) purpose of preventing the transition from one category of tobaccos to another lower-taxed category.

57. It should be noted, in the fourth and last place, that while, in principle, as established in point 49 of this Opinion, an indirect tax should not pursue objectives similar to those of excise duty – if it is not to deprive the harmonised provisions of Directive 2008/118 of their meaning –

[28] Judgment of 24 February 2000, *Commission* v *France* (C-434/97, EU:C:2000:98), and Opinion of Advocate General Saggio in *Commission* v *France* (C-434/97, EU:C:1999:341, point 13). See also, by analogy in the field of the environment, judgments of 22 June 2023, *Endesa Generación* (C-833/21, EU:C:2023:516, paragraph 45); and of 27 February 2014, *Transportes Jordi Besora* (C-82/12, EU:C:2014:108, paragraph 32); and also Opinion of Advocate General Wahl in *Transportes Jordi Besora* (C-82/12, EU:C:2013:694, point 22).

[29] Order of 7 February 2022, *Vapo Atlantic* (C-460/21, EU:C:2022:83, paragraph 28 and the case-law cited).

[30] It should be pointed out, in that regard, that the Court does not have jurisdiction either to examine the more or less harmful nature of rolls of heated tobacco by comparison with (conventional) cigarettes or to rule on the recommendations of the World Health Organisation on the harmfulness of heated tobacco.

that cannot be reflected in a prohibition on Member States adapting their fiscal rules in order to take the particularities of new tobacco products placed on the market into consideration in order to ensure the smooth functioning of the internal market and prevent the distortion of competition, which are two of the objectives pursued by that directive.[31] By 'aligning' the fiscal regime of heated tobacco with that of cigarettes, the German legislation seeks, in this case, in addition to health protection, also to ensure similar tax treatment for products which consumers would perceive as interchangeable.

(b) The conformity of the method of calculating the 'other tax' with Article 1(2) of Directive 2008/118 and Article 14 of Directive 2011/64

58. After having established that the first condition relating to the specific nature of the tax is satisfied, I shall now examine whether the measure at issue also complies with the second condition laid down in Article 1(2) of Directive 2008/118. In order for such a supplementary tax to be deemed compatible with EU law, it must comply with the Community tax rules applicable to excise duty or VAT, as regards in particular the determination of the tax base and the calculation of that tax. That provision thus makes reference to Directive 2011/64 and in particular to Article 14 of that directive, which lays down the procedures for the calculation of other taxes applied to tobacco products subject to excise duty.

59. The referring court asks, in essence, whether the national legislation at issue in the main proceedings, which provides that the amount of the excise duty charged on heated tobacco is to be determined on the basis of the excise duty on pipe tobacco, and of a supplementary tax equal to 80% of the excise duty on cigarettes, less the amount of the excise duty on pipe tobacco, is compatible with Article 14(3) of Directive 2011/64. In the referring court's view, it is necessary to ascertain whether that national legislation draws a distinction within products belonging to the same group of manufactured tobaccos, which is prohibited by Article 14(3).

60. The referring court also has doubts about the compatibility with point (b) of the first subparagraph of Article 14(1) and point (c) of the first subparagraph of Article 14(2) of Directive 2011/64 of national legislation which provides that the tax on heated tobacco is to be composed of two amounts, one of which is determined on the basis of an *ad valorem* rate and the other on the basis of a specific rate, calculated on the weight and the number of rolls of heated tobacco. It observes that those provisions do not provide for such a tax formula.

61. At the outset, it must be stated that the procedures for the calculation of that tax, expressed as a percentage of the amount of excise duty on cigarettes, less the amount of the excise duty on other smoking tobaccos, is among those provided for in Article 14(1) of Directive 2011/64.

62. It would appear, however, that that tax runs counter to the principles laid down in Article 14(2) and (3) of Directive 2011/64, in so far as the tax base of the supplementary tax is, as for cigarettes, the number of units and not the weight, as is the case for 'other smoking tobaccos'.[32] In addition, the procedures for calculating the supplementary tax are separate from those for the

[31] See point 31 of this Opinion.

[32] The tax at issue in the main proceedings would result in the application of different methods of determining, in particular, the tax base and the calculation, for the overall tax burden on the same product, made up of a combination of the excise duty and the supplementary tax on the same products. More specifically, the procedures for the calculation of the supplementary tax differ from those relating to the 'other smoking tobaccos' group, in so far as the overall amount of the supplementary tax is set as a percentage of the retail selling price and by the number of items, and not as a percentage of the retail selling price and/or per kilogram, as defined in Article 14(2)(c) of Directive 2011/64 for 'other smoking tobaccos'.

excise duty applicable to other products in the group 'other smoking tobaccos', and, more particularly, for pipe tobacco. They therefore do not comply with Article 14(3) of that directive, which provides that the rates or amounts referred to in paragraphs 1 and 2 of that Article are to be effective for all products belonging to the group of manufactured tobaccos concerned, without distinction within each group of manufactured tobaccos.

63. Nonetheless, I am of the view that the discrepancy found between, on the one hand, the calculation method laid down in Directive 2011/64 and, on the other, the legislation at issue in the main proceedings is not such as to automatically render the tax at issue incompatible with that directive.

64. In the first place, it follows from the Court's case-law that Article 1(2) of Directive 2008/118 does not require Member States to comply with all rules applicable for excise duty or VAT purposes as far as determination of the tax base, calculation of the tax and chargeability and monitoring of the tax are concerned. It is sufficient that the indirect taxes pursing specific objectives should, on those points, accord with the general scheme of one or other of those taxation techniques. [33]

65. In the second place, it should be noted that, in providing in Article 14(3) of Directive 2011/64 that manufactured tobaccos cannot be treated differently within the same group, the EU legislature seeks, principally, to ensure that there is no discriminatory tax treatment between products whose essential characteristics and mode of consumption are, if not identical, at least comparable.

66. As established in points 30 and 31 of this Opinion, the third category of tobaccos identified by that directive, that of 'other smoking tobaccos', must be given a broad interpretation as a residual category intended to encompass different types of tobaccos which do not come within the specific tobaccos identified by that directive. It follows that that category includes, by definition, heterogeneous tobacco products whose manufacturing characteristics and mode of consumption vary and are more diversified than those included in the other two categories in which the products are expressly identified, namely 'cigarettes' and 'cigars and cigarillos'. [34] To require in advance the same tax treatment for all products in the latter category, irrespective of their characteristics and notwithstanding any differences that may exist as to their mode of consumption, might well give rise to discrimination between those products and distort competition between tobacco products belonging to the same group, which would run counter to the objectives of Directive 2011/64. [35]

67. In the third place, it should be borne in mind that the objective pursued by the German legislature when the tax at issue was introduced was to deter consumers from going from one category of tobacco, namely cigarettes, to another category, namely the products at issue in the main proceedings, which were initially taxed at a lower rate. Subject to verification by the referring court, it would seem that the only possible method of aligning the overall amount of tax on heated tobacco with the overall excise duty on cigarettes is the method chosen by the German Government. In the light of their characteristics and their mode of consumption, those products

[33] Judgment of 9 March 2000, *EKW and Wein & Co* (C-437/97, EU:C:2000:110, paragraph 47).

[34] See Article 2(1) of Directive 2011/64.

[35] See recitals 8 and 9 of that directive.

seem to be substitutes for cigarettes and therefore bear more resemblance to cigarettes than to other tobacco products subject to excise duty as 'other smoking tobaccos', which justifies the number of items and not the weight being taken as the criterion for taxation. [36]

68. Consequently, I am of the view that to require complete consistency between the national rules and the provisions of the directives concerning the structure and the rates of excise duty applicable to the different sub-categories of products subject to excise duty could deprive Article 1(2) of Directive 2008/118 of its practical effect. [37]

69. In the light of the foregoing, I propose that the answer to the first question referred should be that Article 1(2) of Directive 2008/118, and point c(ii) of the first subparagraph of Article 2(1) of Directive 2011/64 must be interpreted as not precluding national legislation which provides for a supplementary tax, levied on heated tobacco, which, for the calculation of the tax, provides that, in addition to the rate of taxation for pipe tobacco, a supplementary tax of 80% of the amount of tax for cigarettes, less the amount of tax for pipe tobacco, is to be levied.

B. The second and third questions

70. The referring court's second and third questions are submitted in the event that the supplementary tax at issue in the main proceedings is not another indirect tax levied for specific purposes on excise goods within the meaning of Article 1(2) of Directive 2008/118. Those questions are therefore relevant only in so far as the supplementary tax at issue constitutes an excise duty.

71. In the light of the foregoing analysis and the proposed answer to the first question, there is no need to answer the second and third questions.

V. Conclusion

72. In the light of the foregoing considerations, I propose that the Court of Justice answer the question referred by the Finanzgericht Düsseldorf (Finance Court, Düsseldorf, Germany) for a preliminary ruling as follows:

Article 1(2) of Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC, and point c(ii) of the first subparagraph of Article 2(1) of Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco

must be interpreted as not precluding national legislation which provides for a supplementary tax, levied on heated tobacco, which, for the calculation of the tax, provides that, in addition to the rate of taxation for pipe tobacco, a supplementary tax of 80% of the amount of tax for cigarettes, less the amount of tax for pipe tobacco, is to be levied.

[36] It is apparent from the order for reference that the product manufactured by the applicant is in reality tobacco in individual portions, the mode of consumption of which is similar to that of cigarettes. That assertion is also borne out by the actual wording of the German legislation that introduced the tax at issue, which, in paragraph 1(2a) of the TabStG, describes heated tobacco as 'smoking tobacco in individual portions', and states, moreover, in paragraph 2(1)(5) of the TabStG, that 'an individual portion of smoking tobacco is equivalent to one cigarette'. Furthermore, according to the written observations of the German Government, the objective and the duration of the consumption of heated tobacco correspond to those of the consumption of cigarettes, rather than to those of products in other categories of manufactured tobacco, an assertion which, moreover, has not been disputed by the applicant.

[37] See also Opinion of Advocate General Saggio in *Commission* v *France* (C-434/97, EU:C:1999:341, point 14).